MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

NOVEMBER TERM, 1976

Case No. 76-729

O. J. GIBSON, JR., AND CAPE GIRARDEAU COUNTY BAR ASSOCIATION, [redacted],

Petitioners

vs.

THE HONORABLE STANLEY A. GRIMM, JUDGE, CIRCUIT COURT of CAPE GIRARDEAU COUNTY, MISSOURI, [redacted],

Respondent

Petition for Writ of Certiorari to the Supreme Court of Missouri

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IN THE

Supreme Court of the United States

NOVEMBER TERM, 1976

Case No. 59387

STATE OF MISSOURI ex rel. O.J. GIBSON, JR.,
and CAPE GIRARDEAU BAR ASSOCIATION
Relators

vs.

THE HONORABLE STANELY A. GRIMM, JUDGE,
CIRCUIT COURT of CAPE GIRARDEAU COUNTY, MISSOURI,
Respondent.

Consolidated With

STATE OF MISSOURI,
Appellant,

vs.

MICHAEL WAYNE PROBST,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Missouri

Petitioners herein pray that a Writ of Certiorari be issued to review the judgment herein of the Supreme Court of the State of Missouri entered in the above-entitled consolidated cases on July 12, 1976, petition for rehearing denied September 13, 1976.

OPINION BELOW

The opinion of the Supreme Court of Missouri is not yet reported. The opinions are attached in the appendix at Page 18 and Page 22. The opinions failed to prohibit the Defendant Grimm from holding Petitioner O.J. Gibson, Jr., in contempt and reversed the ruling of the trial court in the State of Missouri vs. Michael Wayne Probst taxing as cost to the state a reasonable attorney's fee for O.J. Gibson, Jr. The opinions of the trial court likewise attached in the prepared transcript on appeal.

JURISDICTION

The judgment of the Supreme Court of Missouri was entered on July 12, 1976. The petition for rehearing was denied on September 13, 1976. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Can the State of Missouri in 1976 continue to fulfill her obligtation, under the Constitution of the United States, to provide competent legal counsel to indigent criminal defendants who face imprisonment by requiring, through its judicial branch of government, a certain, specific class of citizens, to-wit, duly licensed attorneys, to provide their time, talent, resources, office personnel and equipment to represent those indigents without providing that class of citizens, individually, with fair and adequate compensation?

The ultimate question postulated above is presented by this consolidated case in three ways:

(a) Did the Supreme Court of Missouri err in permitting a trial court to require a duly licensed attorney to accept an uncompensated appointment on appeal to represent an indigent criminal defendant possessing a constitutional right to competent counsel by the threat of contempt and its attendant deprivation of his livelihood, and by so holding did the Supreme Court of Missouri violate the constitutional rights of O.J. Gibson, Jr. to due process of law, the equal protection of the law, and simultaneously place him in involuntary servitude?

(b) By discharging the Writ of Prohibition did the Missouri Supreme Court err in holding that a trial court has the power by threat of contempt to compel an attorney to accept an appointment to prosecute an appeal of right for an indigent convicted of a misdemeanor punishable by imprisonment without simultaneously assuring to that attorney adequate compensation for his service and reimbursement for his out-of-pocket expense?

(c) Did the Supreme Court of Missouri err in failing to require the State of Missouri to pay, as court costs, a reasonable attorney's fee, together with reimbursement for actual expenditures to trial counsel who have twice represented in trial an indigent defendant on trial for an imprisonable misdemeanor?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT XII

"Neither slavery nor involuntary servitude . . . shall exist within the United States . . ."

AMENDMENT XIV

" . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This Petition for Writ of Certiorari involves two cases consolidated for hearing by the Supreme Court of Missouri, posing by the use of two remedial devices the constitutional issues hereinbefore referred to. Both cases arise out of the appointment of Ora James Gibson, Jr. to represent Michael Wayne Probst.

On March 26, 1975, Michael Wayne Probst was charged with a violation of Section 560.395, RSMo. 1969, a misdemeanor punishable by imprisonment in the State of Missouri. Following arrest and incarceration, it was determined on April 10, 1975, that the defendant Probst was indigent and O.J. Gibson, Jr., a duly licensed attorney was appointed to represent said Probst. Thereafter on June 6, 1975, trial was held and Michael Wayne Probst was found guilty as charged. Probst was thereafter sentenced to six months in the county jail. Probst then through his appointed counsel filed a notice of appeal to the Circuit Court of Cape Girardeau County, and the appointment of O.J. Gibson, Jr. was continued. Following appropriate and extensive pre-trial proceedings as provided by statute, and as set out in detail in transcript on appeal, the trial was held in the Circuit Court of Cape Girardeau County, 32nd Judicial Circuit, before a jury who found the defendant guilty. Thereafter, Probst appeared and informed the Circuit Court that he desired to appeal to the

Missouri Court of Appeals, St. Louis District, an appeal as a matter of right pursuant to Missouri statutes and the Honorable Stanley A. Grimm, Judge 32nd Judicial Circuit, advised O.J. Gibson, Jr. on December 3 of his intention to reappoint him on appeal. On the day prior, to-wit, December 2, 1975, O.J. Gibson, by counsel, filed with the Circuit Court a Request for Taxing of a reasonable attorney's fee and out-of-pocket expenditures as a result of his representation of the indigent defendant seeking compensation for thirty-seven hours of professional time and $9.60. On December 3, 1975, a reasonable attorney's fee was taxed as costs to the state in the amount of $550.00 and $9.60. Following motion to retax costs by the prosecuting attorney, notice of appeal by the State of Missouri was filed in the Missouri Court of Appeals, St. Louis District, on December 23, 1975.

Simultaneously, on December 3, 1975, having been advised of the Court's intent to reappoint him on appeal, Mr. Gibson declined said appointment. The Circuit Court thereupon advised Mr. Gibson of the Court's intention to hold Mr. Gibson in contempt. Whereupon, Mr. Gibson by counsel immediately, and raising specific, constitutional issues presented herein filed his Petition for Writ of Prohibition in the Missouri Court of Appeals as prescribed by Missouri Rules of Appellate Procedure, and thereafter the Missouri Court of Appeals, St. Louis District, issued on December 30, its preliminary Writ of Prohibition. Thereafter, the cases were consolidated and transferred to the Supreme Court of Missouri.

The precise federal constitutional issues raised here were presented at the earliest and first available opportunity by means of application for writ of prohibition and in the application to tax costs and your petitioner's response to the appeal of the State of Missouri. Precise points were first raised as appears herein in the appendix at Page 29, wherein in the

application for Writ of Prohibition said O.J. Gibson, Jr. advised the Court that the action contemplated by the trial court would "unlawfully deprive said O.J. Gibson, Jr. of his liberty and property in violation of Amendments V, XIII and XIV of the Constitution of the United States," and said issues were amplified in the suggestions in support thereof, wherein Mr. Gibson asserted, "the forcing of an unwilling attorney to accept uncompensated appointment to defend an indigent accused violates the constitutional prohibition against deprivation of his property without due process of law, denies him the equal protection of the law and constitutes involuntary servitude. Said points were further amplified in the consolidated case involving the retaxing of costs at the first available opportunity, to-wit, Respondent O.J. Gibson, Jr.'s brief wherein the identical claims were presented.

Since August 1972, O.J. Gibson, Jr., had, prior to this litigation been appointed to represent indigent defendants by the Magistrate Court of Cape Girardeau County on sixty-two occasions and had been appointed in the Circuit Court of Cape Girardeau County to represent indigents on nineteen separate occasions. The sixty-two appointments in the Magistrate Court of Cape Girardeau County resulted in the receipt of no compensation by Mr. Gibson. Additional statistical data as to the enormous cost of this system is attached in the appendix hereto.

REASONS FOR GRANTING THE WRIT

This Court must grant this petition to allow studied consideration of the primary question presented by this litigation not heretofore settled by the United States Supreme Court in a modern context and to consider whether or not under the United States Constitution attorneys are entitled

individually and as a class to vindication of their constitutional rights to the same extent the constitutional rights of those whom they are appointed to defend are and have been vindicated.

Throughout these proceedings, the primary issue presented by your petitioners is the legitimacy of the position of the State of Missouri that attorneys at law in general, and O.J. Gibson, Jr. in particular, can be singled out and required under threat of contempt to carry the constitutional obligations of the State of Missouri. This Court beginning with **Powell vs. State of Alabama**, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932) has required pursuant to the Sixth Amendment that the State furnish counsel to accused indigent criminals. In that case this Court did not say, nor did the Court mean to say, that the ultimate obligation to furnish counsel reposed in the bar. In **Gideon vs. Wainwright**, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed. 2d 799, this Court made it clear that the obligation was the obligation of the State and not the personal obligation of the attorneys. Then in a series of cases the obligations of the state to furnish indigent defendants, to-wit, **Douglas vs. California**, 372 U.S. 353, (1963); **Swenson vs. Bosler**, 386 U.S. 258 (1957); **United States vs. Wade**, 388 U.S. 218 (1967); **Coleman vs. Alabama**, 399 U.S. 1 (1970); **In Re Gault**, 387 U.S. 1 (1967) and **Argersinger vs. Hamlin**, 407 U.S. 25 (1972), this Court succinctly held that the defendant's Sixth Amendment rights must be satisfied by the states.

With the recognition of the extent to which constitutional assistance of counsel is required has come a corresponding increase in the burden imposed upon the appointed counsel. Information from the office of the State Court's Administrator, State of Missouri, reveal just in the period from 1972 to date that there has been a drastic increase in felony cases alone just in this circuit. In the 1972–1973 year there were

forty-two cases; in 1973–1974 year there were seventy-six cases; in 1974–1975 year there were one hundred two cases; and in 1975–1976 year there were one hundred one cases, and these, of course, are felonies only. In addition, as pointed out in the appendix, on Page 48 following the **Argersinger** ruling, the office of the State Court Administrator anticipates an additional 1,941 appointments could be expected in the State of Missouri. The burden upon the bar and upon O.J. Gibson, Jr. in particular, is not an insubstantial one. Cape Girardeau County, Missouri, is a second-class county, having a 1970 population of 49,350 people. During the period November of 1972 through December of 1975, Cape Girardeau County lawyers were appointed to defend no less than 183 indigents accused of felonies. While the precise number of appointments to defend indigents accused of misdemeanors cannot be accurately fixed, at least forty-seven such appointments were made by the Magistrate and assuming a constant ration of appointments made to cases filed, at least an additional thirty-nine appointments for misdemeanors were made by the Circuit Judge for a total of eighty-six such appointments. Of these appointments your petitioner O.J. Gibson has been required to represent indigent defendants in the Magistrate Court in sixty-two instances and in the Circuit Court on nineteen occasions.

Until November 20, 1972, Missouri had no system of compensation whatsoever for court appointed counsel. From that day forward Missouri has had "a system" of compensation for appointed counsel in felony cases. With the passage of S.C.S.H.C.S. Bill No. 1095, the General Assembly has provided for the defense of indigents charged with a misdemeanor under the existing compensation act.

In spite of these decisions, the Missouri Supreme Court held "we do not consider it unreasonable to require the attorneys of Missouri, including O.J. Gibson, Jr., to bear the

burden of past assignments alone."

By so holding, the Court shackled O.J. Gibson, Jr., and the bar generally with the badge of involuntary servitude and guaranteed the continued deprivation of due process of law and perpetuated the unreasonable and arbitrary classification depriving attorneys as a class, and Mr. Gibson in particular, of the equal protection of the law.

Perhaps it is particularly ironic that on July 1 (preceding its July 12 decision below) the Supreme Court entered its Order, attached as appendix, Page 51 revealing that from and after July 1 no court appointed counsel would be paid for a one year period or until June 30, 1977, and recognizing that it had on July 1, 1976, approved fee bills for felonies only in the amount of $286,956.07, computed at the rate of fifteen dollars ($15.00) per hour and funds of $144,935.64. The irony is heightened by the fact that while the General Assembly and House Bill 1097 provided for the appointment of counsel for indigents, it did not appropriate any funds to fund the additional representation estimated at 1,941 additional appointments. The litigation thus involves substantially more than $550 in attorney's fees and $9.60 in out-of-pocket expenditures found by the Missouri Supreme Court to be reasonable and logically due and owing O.J. Gibson, Jr. for two jury trials up to the time he was to be appointed on the final appeal of right to the Missouri Court of Appeals.

The size of the burden as revealed by the statistics from the State Court Administrator and as related only to this one county (being one of 140 counties in this State), illuminates the scope of the problem. In Cape Girardeau County alone in the last two years the Bar Association consisting of thirty-eight active lawyers was appointed in 269 criminal cases. Calculated on the Supreme Court ordered rate of $15 per hour the time spent per felony case approximated 11.5 hours. Assuming a corresponding amount of time in

serious misdemeanor cases, Cape Girardeau County lawyers expended in excess of 3,500 hours on court appointed cases during the period July 19, 1973, through July 19, 1976, for which they received, theoretically, only some $45,780. In fact, $41,781.05 was received, and this for felony cases alone, there being no payments for misdemeanor cases. Based on the Missouri Bar survey of income for the year 1970, the average hourly rate for Missouri lawyers was between $30 and $35 per hour. Applying this to the time available and the court ordered rate of a maximum of $15 per hour, Cape Girardeau County lawyers lost at a minimum $15 per hour or $52,350 in fees for appointive work for the period July, 1973, through June, 1975, based on 1970 income figures. When the hourly charge is increased to the comparable levels at $42.50 to $50 per hour the actual loss of revenue for the period was between $78,525 and $104,700. This financial loss is in direct lost fees and does not count for loss of other remunerative work or the fact that the average law office overhead exceeds the sum allowed.

In the earliest days the arguments made here again in this writ were rejected almost uniformly by findings that, in essence, as licensed attorneys and officers of the Court it was an "obligation" of the attorney as an officer of the Court to accept that burden.

In 1976 the fact is that the situation is radically different. The early nineteenth century lawyer had virtually no overhead; no complicated office equipment; his library expenses were almost nil; there was no staff to pay; rent was low and there were no such things as telephone, transportation or related expenses. An occasional appointment for the occasional murder, indeed, probably was not a burden. Such has long since ceased to be the case.

Again and again studies of the situation present in Missouri have revealed the inherent flaws and weaknesses in the

system. See e.g. "The Uncompensated Appointed Counsel System: A Constitutional and Social Transgression," 60 Kentucky Law Journal 710; "Slave Labors in the Courts – A Suggested Solution," Robert S. Hunter, Case and Comment; "Justice and the Poor," Reginald Huber Smith from "Legal Aid and Elitism in the American Legal Profession" by Ronald M. Pipkin (1972).

Indeed, as reported by the "Report of the Attorney General's Committee on Poverty in the Administration of Federal Court Justice," 29–30 (1963) it was determined that seventy-five percent of the defendants with court appointed counsel plead guilty while only twenty percent of those with retained counsel do so. Other similar studies have reached the following typical conclusion:

> "In the light of reason and in the face of the evidence which has been adduced, it is clear that the assignment system in all but capital cases is unfair to the attorney, unfair to the accused, and that it does not work."

See "Justice and the Poor," *supra*, at Page 113.

Thus, it is revealed that a substantial side effect of the inequity perpetuated by the Missouri system is visited upon those unfortunates who are called upon to be defended by underpaid and unpaid counsel. It is said, "there is considerable force in the contention that a poor man's defense is seriously hampered and often prevented by the failure of our laws to make any provision for the expense of investigation and obtaining evidence, or for compensation to assign counsel except in murder cases. See e.g. Fifth Report of the Law Reform Committee of the New York Bar Association (1915). The situation anticipated by Chief Justice Burger in the **Argersinger** opinion where he states:

> "This will mean not only for defense counsel must be provided, but also additional prosecutors and better facilities for securing information about the accused

as it bears on the probability of a decision to confine." 407 U.S. at 43. The anticipation of this Court will be but a mockery and a farce if the Missouri system is perpetuated.

THE RESULT OF THE SYSTEM PERPETUATED BY THE DECISION OF THE MISSOURI SUPREME COURT IS TO DENY YOUR PETITIONER DUE PROCESS OF LAW, THE EQUAL PROTECTION OF THE LAW, AND TO PLACE HIM IN PERPETUITY IN INVOLUNTARY SERVITUDE.

These identical arguments have, of course, in the past and prior to the realization of the magnitude of the burden imposed upon the bar been rejected by other courts. Well reasoned, modern decisions, however, are to the contrary. For instance in **Bradshaw vs. Ball**, 487 S.W. 2d 294 the Court of Appeals of Kentucky precisely stated:

> ". . . we now declare: First, the system of court appointed uncompensated counsel does not meet the constitutional standards of either the Constitution of the United States or the Constitution of this State."

Indeed, the Missouri Supreme Court prior to its abdication in this opinion of its responsibility, in **State vs. Green**, 470 S.W. 2d 571 (Mo. 1971) made, in essence, the identical determination. Modern progressive thought as illustrated by these decisions mandates the extension by this Court of these principles to licensed attorneys.

The Thirteenth Amendment to the Constitution of the United States specifically bars involuntary servitude. All inditia of involuntary servitude are intended to be abolished by this amendment. **Griffin vs. Breckenridge**, 91 S. Ct. 1790 403 U.S. 88. Yet, this vestage, uncompensated and inadequately compensated counsel remains.

Involuntary servitude is the condition of one who is compelled by force, coercion, or imprisonment and against his will, to labor for another whether he is paid or not. See e.g.

Cruse vs. Landquist, 36 Ill. 193, 197 N.E. 768, Ill. 1935. An uncompensated attorney necessarily fits within this definition where as here Ora James Gibson, Jr. is compelled by force, coercion and the threat of imprisonment to expend his only asset, his time, knowledge and skill, to labor for an indigent criminal defendant whose defense is the constitutional obligation of the state. See **Gideon vs. Wainwright**, *supra*. Violations of due process of law is likewise particularly clear.

The effect of the Missouri Supreme Court's decision is to require O.J. Gibson, Jr. to accept uncompensated representation and will require attorneys in the indefinite future to accept either uncompensated or inadequately compensated employment in order to fulfill a duty placed upon the state by this Court. See e.g. **Gideon** and **Argersinger**. By so acting an attorney's sole property, his skill, ability and time is taken without any process of law. As pointed out by this Court in **Board of Regents vs. Roth**, 408 U.S. 564 at 558 (1972):

> "While this Court has not attempted to define with exactness the liberty . . . guaranteed (by the Fourteenth Amendment), the term has received much consideration and some of the things have been definitely stated. Without doubt it denotes not merely freedom from bodily restraint, but also the right of the individual . . . to engage in any of the common occupations of life . . . "

As such and since the Fifth Amendment is incorporated by the Fourteenth Amendment [**Chicago B&Q R.R. Co. vs. Chicago**, 166 U.S. 226 (1897)] the taking of this property by the state or its agency for a public use without the payment of compensation must necessarily violate the due process clause of the Fourteenth Amendment. In real estate law a taking occurs when a governmental act causes a direct and immediate interference with the use or values of property.

See e.g. **United States vs. Causby**, 328 U.S. 256 (1946); **Jacobs vs. United States**, 290 U.S. 13 (1933). Further, where the amount paid bears no reasonable relationship to the value of the property taken such payment constitutes unconstitutional confiscation of property in direct contravention of the Fourteenth Amendment. **Roberts vs. New York**, 295 U.S. 264.

Clearly and concisely an attorney duly licensed by the State of Missouri has a property right in that license so long as he pays the fees required by the Court and is not otherwise disciplined. This license allows the attorney to expend his time, skill and knowledge to assist those in need of or desirous of his legal services. That he has a right to fair and adequate compensation is wholly unquestioned except in this area where licensed attorneys have been made to bear and finance the burden of the State. Indeed, it is particularly clear that in the fiscal year 1975–1976, lawyers are being taxed by the Missouri Legislature to the extent of $142,020.43 for representations of felons at the rate of $15 and an incalculable amount for the representation of juveniles and misdemeanors punishable by incarceration. Since it must be conceded that $15 an hour is woefully inadequate the Court actually receives certified fee bills for felonies totaling $553,744.43. Barely adequate compensation should have amounted to $1,661,323.29. Deducting the amounts paid, in truth and fact, the State of Missouri has taxed, and confiscated the property of its lawyers in non-public defender circuits to the extent of $1,104,633.65. It thus should be clear that the opinion of the Missouri Supreme Court directly conflicts with 42 U.S.C. 1983 and 1985 and violates the principles of this Court enunciated in **Meyer vs. Nebraska**, 262 U.S. 390, **Board of Regents vs. Roth**, 408 U.S. 546 and **Perry vs. Sinderman**, 408 U.S. 593.

Violation of the equal protection clause is similarly apparent. The equal protection clause of the constitution does not per se prohibit classification. It does prohibit and forbid arbitrary discrimination an irrational, unreasonable classification. Perhaps equally important is the fact that it does prohibit discrimination of persons within the same classification. See e.g. **Kasky Baking Company vs. Virginia**, 61 S. Ct. 881, 313 U.S. 117.

Violation of these fundamental principles is inherent in the system approved by the Missouri Supreme Court within the State of Missouri as revealed by appendix Page 25. There are two classifications of lawyers: those in public defender circuits where no appointments are made and those in non-public defender circuits which are purely appointive. Beyond this arbitrary, unreasonable and irrational classification is the fact that among the class of people regulated and licensed by the State, to-wit, attorneys, physicians, osteopaths, podiatrists, barbers, cosmetologists, bars and taverns, egg and poultry producers, meat packers, etc., only the lawyer is compelled to perform free services.

It is preposterous to suggest that because a barber is licensed by the State Board of Barber Examinors or that a cosmetologist is licensed by the State Board of Cosmetology that these boards could order a barber or hairdresser to provide free haircuts and free permanents to inmates of the Missouri penal system. It is preposterous to suggest that the State Board of Healing Arts could order a physician or osteopath, as members of a learned profession, to provide free medical care to indigents, either in the penal system or out of the penal system.

It is preposterous to assume that licensed meat packers, poultry and egg producers could be compelled to provide free food to indigent criminals. The fact is that in each comparable case of a class of licensed professionals and individuals only the lawyers have been singled out and discrimin-

ated against by being required to render free service to indigent criminals. The situation cries out for studied consideration and rectification.

CONCLUSION

Because of the change of circumstances and the immense financial burden imposed upon O.J. Gibson, Jr. and members of the Bar Association of this State by virtue of the underlying opinion of the Missouri Supreme Court, it is critical to the continued financial integrity of the bar, of O.J. Gibson, Jr., and the fair representation of indigent criminal defendants, that this Court review the system of uncompensated and inadequately compensated counsel as perpetuated by the Supreme Court of Missouri in light of the Thirteenth and Fourteenth Amendments to the Constitution of the United States.

John L. Oliver, Jr., Attorney
for O.J. Gibson, Jr.

CERTIFICATE OF SERVICE

I, John L. Oliver, an attorney in the offices of Oliver, Oliver & Jones, attorneys of record for Petitioners O.J. Gibson, Jr. and the Cape County Bar Association, and applicants herein propose and say that on the 24th day of November, 1976, I served a copy of the foregoing petition for writ of certiorari to the Supreme Court of the United States and on the parties thereto by mailing copies in duly addressed envelopes with first-class postage prepaid to the respective attorneys as follows: The Honorable John C. Danforth, Attorney General, State of Missouri, Office of the Attorney General, Supreme Court Building, Jefferson City, Missouri 65101.

By: John L. Oliver, Jr.

STATE OF MISSOURI
COUNTY OF CAPE GIRARDEAU ss.

Subscribed and sworn to before me this 24th day of November, 1976.

Notary Public

My commission expires:

IN THE

Supreme Court of the United States

NOVEMBER TERM, 1976

Case No. 59387

STATE OF MISSOURI ex rel. O.J. GIBSON, JR.,
and CAPE GIRARDEAU BAR ASSOCIATION
Relators

vs.

THE HONORABLE STANELY A. GRIMM, JUDGE,
CIRCUIT COURT of CAPE GIRARDEAU COUNTY, MISSOURI,
Respondent.

Consolidated With

STATE OF MISSOURI,
Appellant,

vs.

MICHAEL WAYNE PROBST,
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Appendix to Petition for Writ of Certiorari to the Supreme Court of Missouri

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IN THE SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI ex rel. O.J. GIBSON, JR., and
CAPE GIRARDEAU BAR ASSOCIATION,
Relators,

vs.

THE HONORABLE STANLEY A. GRIMM, Judge, CIRCUIT COURT OF CAPE GIRARDEAU COUNTY, MISSOURI,
Respondent.

Consolidated With

STATE OF MISSOURI,
Appellant,

vs.

MICHAEL WAYNE PROBST,
Respondent.

No. 59387

Appeal from the Circuit Court of Cape Girardeau County
Honorable Stanley A. Grimm, Judge

These cases involve the question whether counsel appointed to represent indigents in misdemeanor cases shall be required to serve without compensation.

In State ex rel. O.J. Gibson vs. Grimm, Relators seek to prohibit Respondent from holding Gibson in contempt of court. In State v. Probst, the State appeals from an order taxing the costs in a misdemeanor case against the State.

On April 10, 1975, O.J. Gibson, Jr. was appointed to represent Michael Wayne Probst, an indigent, in a misdemeanor case before the Magistrate Court of Cape Girardeau County. Probst was found guilty after trial before the Magistrate Court and Gibson prosecuted an appeal to the Circuit Court. A jury

found Probst guilty and a motion for new trial was overruled. Probst then informed the Circuit Court that he desired to appeal. The Court informed Gibson on December 3, 1975, of its intention to reappoint him to the case, whereupon Gibson declined further service without compensation. On December 15, 1975, Respondent made known his intention to hold Gibson in contempt, and on December 30, 1975, a preliminary rule in prohibition was issued by the St. Louis District of the Court of Appeals.

On December 2, 1975, O.J. Gibson, Jr. filed a motion in State v. Probst for allowance of attorney's fees and expenses. This motion was granted December 3, 1975, taxing costs against the State of Missouri and Cape Girardeau County. On December 4, 1975, the prosecuting attorney of Cape Girardeau County filed a motion to retax costs alleging a lack of statutory authority for reimbursement of attorneys appointed in misdemeanor cases. This motion was sustained as to Cape Girardeau County and overruled as to the State. On December 23, 1975, the State filed a notice of appeal to the St. Louis District of the Court of Appeals.

By order of January 15, 1976, this Court, on its own motion, transferred both causes to this Court.

In **Argersinger v. Hamlin**, 407 U.S. 25, 92 S. Ct. 2006, 32 L.Ed. 2d 530 (1972), the United States Supreme Court held that the Sixth Amendment to the Constitution of the United States forbids the imposition of a prison or jail sentence on any indigent who has not been afforded the right to counsel. In Missouri, the effect of **Argersinger** is to require that counsel be provided indigents in criminal cases where a sentence of imprisonment may be imposed for commission of a misdemeanor as well as in cases where commission of a felony is charged. Cf. **Gideon v. Wainwright**, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed. 2d 799 (1963); **State v. Green**, 470 S.W. 2d 571 (Mo. banc 1971).

In **Green**, *supra*, (470 S.W. 2d 571, 573) this Court, on September 13, 1971, believing the burden on Missouri lawyers of representing indigents in criminal cases without compensation to be unreasonable, announced that after September 1, 1972, the attorneys of Missouri would not be compelled "to discharge *alone* 'a duty which constitutionally is the burden of the State.'" The General Assembly responded in 1972, and enacted §§ 600.010–600.085, RSMo. Supp. 1973, which provided generally for the defense of indigents charged in connection with a felony. No provision was made for the defense of indigents charged in connection with a misdemeanor.

However, the General Assembly has now acted to provide for the defense of indigents charged with a misdemeanor which will probably result in confinement in the county jail upon conviction (S.C.S. H.C.S. House Bill No. 1095, Second Regular Session, 78th General Assembly, effective August 13, 1976). Thus, this burden on the attorneys of Missouri has now, for all practical purposes, ended.

We recognize that many attorneys in Missouri have borne this burden without compensation and that they contend they should be compensated for services rendered in the past. We also recognize that the claim submitted by O.J. Gibson, Jr. for services and expenses is reasonable in amount. However, no money may be withdrawn from the state treasury other than by an appropriation law [Mo. Const., Art. IV, § 28; **State ex inf. Danforth v. Merrell**, 530 S.W. 2d 209 (Mo. banc 1975)], and, in the circumstances, we do not consider it unreasonable to require the attorneys of Missouri, including O.J. Gibson, Jr., to bear the burden of past assignments alone.

The order of the trial court taxing costs is reversed. We are confident the parties will proceed in the future in a manner consistent with this opinion. Accordingly, the preliminary rule in prohibition is discharged.

Robert T. Donnelly, Judge

Seiler, C.J., Morgan, Holman and Henley, JJ., concur; Bardgett, J., concurs in result; Finch, J., concurs in result in separate opinion filed.

IN THE SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI ex rel. O.J. GIBSON, JR., and CAPE GIRARDEAU BAR ASSOCIATION, Relators, vs. THE HONORABLE STANLEY A. GRIMM, Judge, CIRCUIT COURT OF CAPE GIRARDEAU COUNTY, MISSOURI, Respondent. Consolidated With STATE OF MISSOURI, Appellant, vs. MICHAEL WAYNE PROBST, Respondent.	No. 59387

OPINION CONCURRING IN RESULT

In view of the fact that the General Assembly has provided that an indigent charged with a misdemeanor which probably will result in confinement will be provided with counsel,[1] I agree that as a matter of policy we should reach the result arrived at in the principal opinion. I so conclude on the assumption made therein that enactment of this legislation will eleminate the need for attorneys to continue to handle large numbers of misdemeanor cases without compensation or reimbursement.[2]

1. Section 600.047 of S.C.S. H.C.S. for House Bill No. 1095, effective August 13, 1976.

In so voting in this case, I desire to make it clear that I do so purely on the basis of policy considerations. I continue to hold the views expressed in my dissenting opinion in **State v. Green**, 470 S.W. 2d 571 (Mo. banc 1971), as to the power of a court to tax an attorney's fee as court costs. Were it not for the amendment to the Public Defender Act adopted in the recent legislative session, I would vote to make permanent a writ of prohibition in State ex rel. Gibson v. Grimm, and in State v. Michael Wayne Probst, I would hold that the court did have authority to tax as costs an attorney fee for representing the indigent defendant. Whether such costs should be taxed therein against the State, as I suggested in **Green**, or against the county because the charge is a misdemeanor is a question that I would want to consider further.

James A. Finch, Jr., Judge

2. While the General Assembly provided for appointment of counsel for indigents charged with misdemeanors, it did not appropriate funds which will be required to fund this additional representation. We can reasonably anticipate, however, that the next session of the General Assembly will appropriate emergency funds for this purpose for this fiscal year.

CLERK OF THE SUPREME COURT
STATE OF MISSOURI, JEFFERSON CITY, MISSOURI 65101

SEPTEMBER 13, 1976

Mr. Jack L. Oliver
400 Broadway
Cape Girardeau, Mo. 63701

In re: State ex rel. Gibson et al. vs. Grimm
State of Missouri vs. Probst, No. 59387

Dear Sir:

This is to advise that the Court this day has made the following order in the above-entitled cause:

"Relators -respondent's motion for rehearing overruled."

Yours very truly,

Thomas F. Simon, Clerk.

cc – Attorney General – Robert M. Sommers

IN THE SUPREME COURT OF MISSOURI
EN BANC

STATE ex rel. JOHN C. DANFORTH, Attorney General, et al., Relators, vs. HON. JULIAN M. LEVITT, Judge, Respondent.	No. 59236
Consolidated With	
JOSEPH H. MOORE, et al., Respondents, vs. STATE OF MISSOURI, et al., Appellants.	No. 59248

Appeal from the Circuit Court of Jackson County
Honorable Julian M. Levitt, Judge

Attorneys Joseph H. Moore and William E. Mounts, both licensed to practice law in the State of Missouri, filed a petition for declaratory judgment in the Circuit Court of Jackson County against the State of Missouri. In said suit, they alleged that they had been appointed to represent, and had represented, indigents charged with the commission of misdemeanors, and asked that Jackson County or the State of Missouri be held liable in an amount sufficient to compensate them for their services.

A summons was served at the office of the Governor on August 21, 1973. No entry of appearance was made on behalf of the State of Missouri, and a default judgment was entered against the State of Missouri on November 5, 1973. The judgment declared the State liable in the amount of $900.00, and ordered the issuance of execution. A garnish-

ment summons was subsequently served on a Kansas City bank which was a depository of State funds. On April 29, 1974, the State filed a motion to set aside the judment and a petition to quash the garnishment. The motion and petition were denied on September 18, 1975. The State filed a notice of appeal and applied for a writ of prohibition. Our preliminary rule in prohibition issued on October 13, 1975. The appeal (No. 59248) and the proceeding in prohibition (No. 59236) were consolidated and were argued to the Court on January 21, 1976.

In **State ex rel. Gibson v. Grimm**, —— S.W. 2d —— (Mo. banc 1976), No. 59387, decided concurrently herewith, we (1) note that the General Assembly has now provided for the defense of indigents charged with a misdemeanor which will probably result in confinement in the county jail upon conviction; (2) note that this burden heretofore imposed on the attorneys of Missouri has now, for all practical purposes, ended; and (3) hold that, in this situation, we do not consider it unreasonable to require the attorneys of Missouri to bear the burden of past assignments alone.

We consider the decision in **Gibson** controlling here, and hold that the trial judge erred and was without power to order the State of Missouri to compensate counsel.

The preliminary rule in prohibition is made absolute and the judgment is reversed.

Robert T. Donnelly, Judge

Seiler, C.J., Morgan, Holman and Henley, JJ., concur: Bardgett, J., concurs in result; Finch, J., concurs in result in separate opinion filed.

IN THE SUPREME COURT OF MISSOURI
EN BANC

STATE ex rel. JOHN C. DANFORTH, Attorney General, et al., Relators, vs. HON. JULIAN M. LEVITT, Judge Respondent.	No. 59236
Consolidated With	
JOSEPH H. MOORE, et al., Respondents, vs. STATE OF MISSOURI, et al., Appellants.	No. 59248

OPINION CONCURRING IN RESULT

For the reasons expressed in my separate opinion concurring in result in **State ex rel. Gibson v. Grimm**, —— S.W. 2d —— (Mo. banc 1976), No. 59387, I concur in result herein. Were it not for the recent enactment providing for appointment of counsel for indigent defendants charged with misdemeanors likely to result in confinement, I would vote otherwise, taking the position that the judge did have authority to allow a fee to counsel representing defendant and that it should be taxed as costs.

James A. Finch, Jr., Judge

IN THE MISSOURI COURT OF APPEALS
ST. LOUIS DISTRICT

STATE ex REL. O.J. GIBSON, JR., and CAPE GIRARDEAU COUNTY BAR ASSOCIATION, Relators, vs. THE HONORABLE STANLEY A. GRIMM, JUDGE OF THE CIRCUIT COURT OF CAPE GIRARDEAU COUNTY, MISSOURI, Respondent.	}	Case No. ____

NOTICE OF PETITION FOR WRIT OF PROHIBITION

TO THE HONORABLE STANLEY A. GRIMM, JUDGE OF THE CIRCUIT COURT OF CAPE GIRARDEAU COUNTY, MISSOURI, AND TO HIS ATTORNEY:

You are hereby notified that the Relators will file with the Missouri Corurt of Appeals, St. Louis District, a Petition For an Alternative Writ of Prohibition and Suggestions in Support of the same, copies of which are attached hereto; on the 29th day of December, 1975, in the City of St. Louis, Missouri, at which time the Relator will request the issuance of a Preliminary Writ of Prohibition commanding the Defendant to refrain from issuing a writ of contempt against O.J. Gibson, Jr., a member of the Cape Girardeau County Bar Association, in connection with the case of **State of Missouri vs. Michael Wayne Probst**, No. 75 CR 66, presently pending in said Circuit Court of Cape Girardeau County, Missouri.

Jack L. Oliver,
Attorney for Relators, O.J. Gibson, Jr., and Cape Girardeau County Bar Association
400 Broadway
Cape Girardeau, Missouri 63701

IN THE MISSOURI COURT OF APPEALS
ST. LOUIS DISTRICT

O.J. GIBSON, JR. and CAPE GIRARDEAU COUNTY BAR ASSOCIATION, a Pro forma Decree Corporation, Relators, vs. THE HONORABLE STANLEY A. GRIMM, JUDGE, CIRCUIT COURT OF CAPE GIRARDEAU COUNTY, MISSOURI, Respondent.	}	Case No. ____

PETITION FOR WRIT OF PROHIBITION

TO THE MISSOURI COURT OF APPEALS, ST. LOUIS DISTRICT:

The Petition of O.J. GIBSON, JR., and CAPE GIRARDEAU COUNTY BAR ASSOCIATION, a Pro forma Decree Corporation, Relators, respectfully alleges:

1. That on or about April 10, 1975, O.J. Gibson, Jr., a member of the Cape Girardeau County Bar Association, was appointed by the Honorable Jerry S. Estes, Judge of the Magistrate Court of Cape Girardeau County, Missouri, to defend a Complaint and Information in Misdemeanor, filed by William L. Syler, Assistant Prosecuting Attorney of Cape Girardeau County, Missouri, against Michael Wayne Probst, an indigent, in which the said Michael Wayne Probst was charged with a violation of Section 560.395 RSMo. 1969, which said offense is punishable by fine or imprisonment or both; that thereafter the said O.J. Gibson, Jr. competently performed professional services for and on behalf of the indigent defendant and represented the defendant in a trial of the cause before the Honorable Jerry S. Estes, Judge of the Magistrate Court of Cape Girardeau County, Missouri, on June 3, 1975; that thereafter, and on a finding of the defendant's guilt by the Magistrate Court, the said O.J. Gibson, Jr., on behalf of the indigent defendant, prosecuted an appeal to the Cir-

cuit Court of Cape Girardeau County, Missouri, and thereafter on August 12, 1975, defended said indigent in the trial of such charges before a jury, which said jury found the indigent defendant guilty of the charges contained in the Complaint and Information and fixed the indigent defendant's punishment at six (6) months in the County Jail; and that thereafter the said O.J. Gibson, Jr. filed on behalf of said indigent defendant a Motion For New Trial, which was argued on September 15, 1975, and thereafter by the Court denied.

2. That, thereafter, the said indigent defendant indicated to the Circuit Court of Cape Girardeau County, Missouri, that he desired to perfect an appeal from the judgment of the Court in overruling his Motion For New Trial, and on the 3rd day of December, 1975, the Honorable Stanley A. Grimm, Judge of the Circuit Court of Cape Girardeau County, Missouri, Respondent herein, notified said O.J. Gibson, Jr. that he intended, on the 15th of December, 1975, to reappoint said O.J. Gibson, Jr. as attorney for the indigent defendant for the purpose of prosecuting the appeal, as aforesaid. A copy of said notification is attached hereto and marked "Exhibit A."

3. That, thereafter, on the 5th day of December, 1975, said O.J. Gibson, Jr., by letter to said Judge, copy of which is attached hereto and marked "Exhibit B," indicated to the Court his unwillingness to proceed further with the defense of the indigent, Michael Wayne Probst, stating to the Court that his appointments to defend indigents accused of crime by the Magistrate Court of Cape Girardeau County, Missouri, and the Circuit Court of Cape Girardeau County, Missouri, and resultant diminution of income from his profession had reached a point that has endangered his family's security.

4. That, thereafter, and on the 9th day of December, 1975, the Honorable Stanley A. Grimm, Judge of the Circuit Court of Cape Girardeau County, Missouri, Respondent herein, wrote to the said O.J. Gibson, Jr. a letter, copy of which is attached hereto and marked as "Exhibit C," by means of which the said Judge threatens to hold said O.J. Gibson, Jr. in contempt of Court if he refused to accept his reappointment as counsel for the indigent defendant, Michael Wayne Probst.

5. That, thereafter, and on the 12th day of December, 1975, Cape Girardeau County Bar Association, one of the Relators herein, wrote a letter, copy of which is attached and marked as Relators' "Exhibit D," to the honorable Jerry S. Estes, Judge of the Magistrate Court of Cape Girardeau County, Missouri, and to the Honorable Stanley A. Grimm, Judge of the Circuit Court of Cape Girardeau County, Missouri, Respondent herein, advising each such Judge that members of the Cape Girardeau County Bar Association would not, in the future, feel compelled to respond to appointments by them for the representation of indigent defendants until such time as the public assumed the constitutional duty of providing compensation for attorneys so designated.

6. That, thereafter, and on December 15, 1975, the Honorable Stanley A. Grimm, at a regularly convened session of the Circuit Court of Cape Girardeau County, Missouri, acknowledged receipt of the correspondence herein above referred to and marked Exhibits "A," "B," "C" and "D," and again announced his intention to forthwith appoint petitioner, O.J. Gibson, Jr., as counsel for the indigent Michael Wayne Probst for the purpose of prosecuting the indigent's appeal, and to cite the petitioner, O.J. Gibson, Jr. for contempt in the event of his refusal to accept such appointment, but thereafter, on petitioner's Motion For Stay, stayed his actions thereon pending the filing of this petition for writ

of prohibition. That a copy of the Order of said Circuit Court of Cape Girardeau County is attached hereto and marked "Exhibit E."

7. That the action of the Honorable Stanley A. Grimm, Judge of the Circuit Court of Cape Girardeau County, Missouri, Respondent herein, in threatening said O.J. Gibson, Jr., an attorney of the Bar and the Circuit Court of Cape Girardeau County, Missouri, with a citation of contempt, was in excess of the powers and jurisdiction of the Circuit Court of Cape Girardeau County, Missouri, vested in him by law, for the reasons that said Court has the inherent power to allow compensation and reimbursement of expenses to attorneys appointed by him to represent indigents accused of crime, and to compel the State of Missouri to pay the same, and for the reason that a citation of contempt directed to the said O.J. Gibson, Jr. by Respondent would unlawfully deprive said O.J. Gibson, Jr. of his liberty and property in violation of Amendments V, XIII and XIV of the Constitution of the United States, and Article I, Sections II and X of the Constitution of Missouri.

8. That O.J. Gibson, Jr. is a member of the Cape Girardeau County Bar Association, and that threatened action of the Honorable Stanley A. Grimm, Judge of the Circuit Court of Cape Girardeau County, Missouri, against said O.J. Gibson, Jr. constitutes an unlawful threatened action not only against the said O.J. Gibson, Jr., but every member of the Cape Girardeau County Bar Association, Relators herein, and these Petitioners have no speedy or adequate remedy by appeal or otherwise from the threatened action of the said Stanley A. Grimm.

WHEREFORE, Your Petitioners pray that this Court issue its Writ of Prohibition commanding said Circuit Court of Cape Girardeau County, Missouri, to desist from any further proceedings to issue its citation of contempt against the said

O.J. Gibson, Jr., or any other member of the Cape Girardeau County Bar Association.

O.J. GIBSON, JR., and
CAPE GIRARDEAU COUNTY
BAR ASSOCIATION

By: Jack L. Oliver
Attorney for Relators
400 Broadway
Cape Girardeau, Mo. 63701

STATE OF MISSOURI
COUNTY OF CAPE GIRARDEAU ss.

O.J. GIBSON, JR., one of the foregoing named petitioners, being duly sworn, on his oath, says that the matters and things stated in the Petition are true to the best of his information, knowledge and belief.

O.J. GIBSON, JR.

Subscribed and sworn to before me this 16th day of December, 1975.

(Seal) Jacquelyn M. Givens, Notary Public

My Notary Commission Expires: November 24, 1976

EXHIBIT "A"

STANLEY A. GRIMM, CIRCUIT JUDGE
COMMON PLEAS COURTHOUSE,
CAPE GIRARDEAU, MISSOURI 63701

DECEMBER 3, 1975

Mr. O.J. Gibson, Jr.
Downs, Johnson & Gibson
Attorneys at Law
34 N. Spanish Street
Cape Girardeau, Missouri 63701

Re: State vs. Probst – No. 75CR66

Dear Jim:

As you know, on November 25, 1975, I denied the defendant's motion for a new trial and sentenced the defendant in accordance with the jury verdict. At that time, the defendant indicated his desire to appeal his conviction and sentence. I took under advisement the question as to who should be appointed to represent him on this appeal.

Since the defendant, Michael Wayne Probst, is an indigent and he is, under the law, entitled to representation on appeal, and since you have, by prior appointment, represented this defendant and are familiar with the facts involved in his case, it is my intention on December 15, 1975 to reappoint you to represent the defendant for the purpose of perfecting his appeal in this cause.

Respectfully,

Stanley A. Grimm

SAG : ns

EXHIBIT "B"

DOWNS, JOHNSON & GIBSON,
ATTORNEYS AND COUNSELORS AT LAW
34 NORTH SPANISH STREET,
CAPE GIRARDEAU, MISSOURI 63701

DECEMBER 5, 1975

Honorable Stanley A. Grimm
Circuit Court Judge
Circuit Court of Cape Girardeau County
Common Pleas Courthouse
Cape Girardeau, Missouri 63701

Re: State of Missouri v. Michael Wayne Probst, No. 75 CR 66

Dear Judge Grimm:

I have for acknowledgement your letter of December 3, 1975, advising me that on the 15th day of December, 1975, you expect to reappoint me to perfect an appeal for the indigent defendant in the above styled case.

The court is, of course, aware of the many instances in which I have been appointed to represent indigents, but may not be aware of the number of appointments received by me in recent months from the Honorable Jerry S. Estes, Judge of the Magistrate Court of this county. My records indicate that since I opened practice in Cape Girardeau in August of 1972, I have been appointed by the Judge of the Magistrate Court to serve in sixty-one criminal cases, and that during the same period I have been appointed to serve by your honor in nineteen criminal cases.

The volume of work to which I have been subjected by appointment and the meager return therefor has reached a point where I must concern myself not only with my obligations to the court and to my profession, but to my family as well.

Under the circumstances outlined above, I respectfully suggest to the court that if appointed by you on the 15th day of December, 1975, to further prosecute the appeal of the defendant, Michael Wayne Probst, I shall after filing a notice of appeal for the indigent defendant, likely respectfully decline to further serve as counsel for the defendant in this cause.

Very respectfully,

DOWNS, JOHNSON & GIBSON

O.J. Gibson, Jr.

OJG, JR : pjs

cc: Honorable Jerry S. Estes,
Cape Girardeau County Bar Association

EXHIBIT "C"

STANLEY A. GRIMM, CIRCUIT JUDGE
COMMON PLEAS COURTHOUSE,
CAPE GIRARDEAU, MISSOURI 63701

DECEMBER 9, 1975

Mr. O.J. Gibson, Jr.
Downs, Johnson & Gibson
Attorneys at Law
P.O. Box 599
Cape Girardeau, Missouri 63701

Re: State vs. Probst

Dear Jim:

This will acknowledge receipt of your letter of December 5, 1975 in which you advised me that it is your intention to refuse appointment as counsel for Michael Wayne Probst to prosecute his appeal.

I agree that you and the other members of the Bar appointed by either the Magistrate Court or the Circuit Court to defend indigents accused of crimes should and are entitled to be compensated by the State of Missouri for their services. However, I cannot and do not agree that simply because payment may not be forthcoming, an attorney of this Court may refuse appointment.

If, therefore, you refuse reappointment to prosecute the appeal of Michael Wayne Probst from the order of this Court overruling his motion for a new trial, I may have no alternative other than to hold you in contempt of this Court.

Respectfully,
Stanley A. Grimm

SAG : ns

APPENDIX

DATA EXCERPTED FROM REPORTS IN OFFICE OF COURTS ADMINISTRATOR, JEFFERSON CITY, MISSOURI, APPOINTED COUNSEL PROGRAM – PUBLIC DEFENDER

1972 – 1973 FUNDS
11-20-72 through 10-31-73

Circuit	No. of Cases	Expenditures	Average Cost Per Case
32	42	$14,464.62	$344.39

1973 – 1974 FUNDS
7-1-73 through 10-31-74

Circuit	No. of Cases	Expenditures	Average Cost Per Case
32	76	$19,076.86	$251.05

1974 – 1975 FUNDS
7-1-74 through 9-30-75

Circuit	No. of Defendants	Expenditures	Average Cost Per Case
32	102	$22,704.19	$222.59

APPOINTED COUNSEL PROGRAM
7-1-75 through 12-31-75

Circuit	No. of Cases Received	Total Amount	Total Paid	No. of Outstanding Obligations	Amount
32	57	$14,528.18	$8,903.88	18	$5,624.30

DATA EXCERPTED BY CIRCUIT CLERK FROM RECORDS OF CIRCUIT COURT OF CAPE GIRARDEAU COUNTY

MISDEMEANORS FILED IN CIRCUIT COURT OF CAPE GIRARDEAU COUNTY

Period	Number	Appointed Counsel
7/1/72 – 6/30/73	28	
7/1/73 – 6/30/74	34	
7/1/74 – 6/30/75	45	
7/1/75 – 12/31/75	28	8

DATA EXCERPTED FROM COST RECORDS OF MAGISTRATE COURT OF CAPE GIRARDEAU COUNTY

Period	No. of Appointments Felonies	No. of Appointments Misdemeanors
11/20/72 – 10/31/73	41	10
11/ 1/73 – 10/31/74	52	13
11/ 1/74 – 6/30/75	55	16
7/ 1/75 – 12/31/75	35	8

DATA FURNISHED BY RELATOR O.J. GIBSON, JR.

Total Appointments, 1972 – 1975

By Circuit Judge 19
By Magistrate Judge 62

Appointments in Misdemeanor Cases – Circuit Court 5
Appointments in Misdemeanor Cases – Magistrate Court 5
Appointments in Juvenile Cases – Circuit Court 4

DATA EXCERPTED FROM RECORDS IN OFFICE OF COURT ADMINISTRATOR – SYNOPSIS OF MISDEMEANOR QUESTIONAIRE FROM MAGISTRATE JUDGES – JANUARY 1974
(3-22-74)

Counties with Appointed Counsel

Responding 65
Not Responding 20
85

Judges with Appointed Counsel

Responding 68
Not Responding 20
88

Estimated Misdemeanors 76,085
Estimated Indigents 5,273
Estimated Appointments 1,175

"The number of appointments per 100 population was calculated to be 1.34 and multiplying the population of 1,449,180 indicated that 1,941 appointments could be anticipated."

1972 – 1973 FUNDS
11-20-72 through 10-31-73

Cir. No.	No. of Cases	Expenditures	Avg. Cost Per Case
01	2	$ 685.91	$ 342.95
02	23	6,087.94	264.69
03	1	3,365.48	3,365.48
04	14	5,442.62	388.75
05	8	1,548.50	193.56
06	30	9,745.86	324.86
07	5	1,082.00	216.40
08	12	2,014.70	167.89
09	1	177.50	177.50
10	38	9,476.94	249.39
11	3	384.00	128.00
12	30	7,399.99	246.66
13	12	1,638.75	136.56
14	6	1,619.70	269.95
15	12	1,332.82	111.06
16	56	20,878.42	372.82
17	17	3,974.41	233.78
18	25	7,125.56	285.02
19	2	991.25	495.62
20	–0–	–0–	–0–
21	1	657.50	657.50
22	5	2,766.95	553.39
23	18	4,008.30	222.68
24	58	21,048.15	362.89
25	8	1,855.85	231.98
26	17	2,741.24	161.24
27	13	1,632.95	125.61
28	17	1,969.52	115.85
29	–0–	–0–	–0–
30	4	1,855.55	463.88
31	183	52,877.31	288.94
32	42	14,464.62	344.39
33	53	9,691.29	182.85
34	134	13,513.08	100.84
35	69	8,726.27	126.46
36	93	18,376.23	197.59
37	20	2,415.00	120.75
38	5	4,745.43	949.08
39	46	5,553.85	120.73
40	20	4,882.25	244.11
41	11	892.92	81.17
42	10	1,952.75	195.27
43	10	2,019.90	201.99
	1,134	$263,619.26	$232.46

APPOINTED COUNSEL PROGRAM

Cir. No.	1973–1974 FUNDS: Regular & Contingency Expenditures 7-1-73/10-31-74	No. of Defendants	Avg. Cost per Defendant	1974–1975 FUNDS: Reg. & Contingency Expenditures 7-1-74/9-30-75	No. of Defendants	Avg. Cost per Defendant
01	$ 884.05	5	$176.81	$2,581.55	6	$430.25
02	7,917.11	36	219.91	7,500.00	34	220.58
03	4,993.19	16	312.07	5,000.00	29	172.41
04	14,312.52	17	841.91	6,500.00	34	191.17
05	1,079.58	4	269.89	1,902.90	4	475.72
06	16,565.46	47	352.45	24,243.05	84	288.60
07	5,998.75	17	352.86	4,235.95	13	325.84
08	3,359.43	18	186.63	3,895.51	18	216.41
09	1,687.78	13	129.82	2,027.99	12	168.99
10	12,274.17	30	409.13	19,411.22	56	346.62
11	547.10	2	273.55	982.75	4	245.68
12	6,293.12	25	251.72	10,277.37	49	209.74
13	3,781.13	6	630.18	3,802.78	8	475.34
14	1,460.85	4	365.21	374.07	2	187.03
15	6,060.91	37	163.80	8,704.44	41	212.30
16	33,559.06	77	435.83	29,508.44	78	378.31
17	7,298.10	38	192.05	8,434.37	54	156.19
18	11,796.06	48	245.75	9,000.00	47	191.48
19	2,774.00	10	277.40	4,425.63	12	368.80
20	555.50	2	275.25	1 358.41	2	179.20
21	7,243.22	14	517.37	5,852.33	24	243.84
22	10,000.00	16	625.00	27,505.70	55	500.10
23	1,197.50	3	399.16	2,706.45	10	270.64
24	25,775.54	85	303.24	26,291.80	122	215.50
25	598.50	2	299.25	782.37	3	260.79
26	10,888.42	45	241.96	6,528.00	34	192.00
27	5,510.91	33	166.99	3,505.26	15	233.68
28	5,098.14	34	149.94	13,984.10	71	196.95
29	–0–	–0–	–0–	1,925.64	3	641.85
30	2,381.36	8	297.67	1,617.84	4	404.46
31	45,340.90	212	213.87	85,823.93	306	280.47
32	19,076.86	76	251.01	22,704.19	102	222.59
33	12,053.30	68	177.25	14,520.00	88	165.00
34	12,401.42	101	122.78	25,106.55	168	149.44
35	12,000.00	92	130.43	14,167.89	100	141.67
36	9,000.00	74	121.62	15,380.63	94	163.62
37	6,470.72	40	161.76	4,742.84	30	158.00
38	13,000.00	68	191.17	17,145.26	62	276.53
39	11,050.76	73	151.38	9,182.31	49	187.39
40	3,132.92	25	125.31	4,000.00	36	111.11
41	4,664.36	25	86.57	4,000.00	28	142.85
42	10,000.00	49	833.33	8,823.89	32	275.74
43	7,662.88	29	264.23	5,000.00	32	156.75
	$377,745.58	1,624	$232.60	$474,463.41	2,055	$230.89

APPOINTED COUNSEL PROGRAM
July 1, 1975 through December 31, 1975

Cir. No.	No. of Cases Received	Total Amount	Total Paid	No. of Outstanding Obligations	Amount
01	5	$ 996.05	$ 865.45	1	$ 130.60
02	17	4,750.27	2,769.11	7	1,981.16
03	9	3,499.38	2,247.38	5	1,252.00
04	16	4,538.72	3,363.97	3	1,174.75
05	1	20.00	20.00	–0–	–0–
06	72	15,710.84	9,222.42	28	6,488.42
07	1	966.30	–0–	1	966.30
08	4	682.67	315.67	1	367.00
09	5	680.05	469.75	2	210.30
10	27	6,948.72	5,214.51	5	1,734.21
11	–0–	–0–	–0–	–0–	–0–
12	28	5,095.50	2,507.30	11	2,588.20
13	4	1,870.85	1,870.85	–0–	–0–
14	–0–	–0–	–0–	–0–	–0–
15	29	4,144.44	3,394.24	8	750.20
16	45	18,411.48	14,363.55	7	4,047.93
17	45	7,989.44	5,490.72	17	2,498.72
18	40	12,558.94	10,086.77	12	2,472.17
19	3	242.80	242.80	–0–	–0–
20	–0–	–0–	–0–	–0–	–0–
21	28	16,606.06	11,582.08	10	5,023.98
22	47	26,887.09	21,362.79	9	5,524.30
23	4	344.50	–0–	4	344.50
24	59	11,870.05	6,672.49	23	5,197.56
25	–0–	–0–	–0–	–0–	–0–
26	28	6,443.16	5,656.14	8	787.02
27	17	2,745.50	2,263.00	4	482.50
28	40	15,641.14	14,843.74	5	797.40
29	1	1,292.50	1,292.50	–0–	–0–
30	5	973.04	875.54	1	97.50
31	226	60,917.21	43,383.05	61	17,534.16
32	57	14,528.18	8,903.88	18	5,624.30
33	76	13,910.33	11,670.35	12	2,239.98
34	121	15,432.77	9,596.31	25	5,836.46
35	104	17,435.23	11,796.82	33	5,638.41
36	63	8,590.42	6,557.70	25	2,032.72
37	33	7,644.53	3,974.28	8	3,670.25
38	60	12,143.31	8,637.66	19	3,505.65
39	24	5,135.79	4,224.54	3	911.25
40	4	639.00	183.75	1	455.25
41	13	4,325.91	4,031.61	4	294.30
42	44	8,851.14	2,566.39	34	6,284.75
43	24	4,345.88	4,345.88	–0–	–0–
	1,420	$345,309.19	$246,864.99	415	$98,944.10

OFFICE OF STATE COURTS ADMINISTRATOR
SUPREME COURT BUILDING,
JEFFERSON CITY, MISSOURI 65101

MEMORANDUM

JULY 16, 1976

To: All Circuit Judges
From: James M. Parkison
Re: Status of Payments from the Appointed Counsel Appropriation

As of the first of July, bills pending in this office for representation of indigents by court appointed counsel totaled $286,956.07 with only $144,935.64 remaining in the appropriation to pay for those bills.

The Supreme Court has ordered that these bills be paid on a pro rata basis and checks are being processed which will represent about half of the amount pending on each bill. These checks are expected about the end of the month.

The Legislature enacted HB 1095 which: creates a new Public Defender Commission; authorizes the expansion of jurisdiction to certain juvenile and misdemeanor cases; provides for recoupment; and authorizes appropriations up to $2,800,000. However, the appropriations for the 1976–1977 year were made under the provisions of the existing law, which contained the $1.8 million ceiling.

The Supreme Court has ordered a freeze on all payments for this fiscal year, except out of pocket expenses from the new appropriations which began July 1, 1976. This means that the procedure which we have used since November, 1975 is still in effect. A copy of the Order is attached for your information.

We expect the Public Defender Commission to be named soon. The subject of appointed counsel payments will be placed before the Commission at its first meeting.

In the event that future funding becomes available to pay the remaining balance of the appointed counsel bills for FY75–76, we will need for you to recertify the unpaid portion of the bills. A listing showing the number and total amount of outstanding bills, by circuit, is attached. If you wish to recertify for your circuit the portion of the bills which are shown on the attachment in the column headed "Bills Pending," please complete the enclosed form and return it to our office at your earliest convenience.

JMP : rr

Attachments

APPOINTED COUNSEL PROGRAM
July 1, 1975 through July 12, 1976

Cir. No.	No. of Cases Received	Total Amount	Total Paid	No. of Outstanding Obligations	Bills Pending
01	10	$ 2,785.72	$ 2,045.96	6	739.76
02	39	9,005.85	6,245.56	27	2,760.29
03	20	6,280.62	4,500.43	16	1,780.19
04	28	11,946.30	9,768.63	12	2,177.67
05	6	2,528.15	1,364.01	5	1,164.14
06	92	21,150.98	15,598.96	48	5,552.02
07	2	1,386.30	725.47	2	660.83
08	8	1,099.17	711.31	5	387.86
09	25	4,748.21	2,734.36	22	2,013.85
10	45	10,123.85	7,856.15	23	2,267.70
11	–0–	–0–	–0–	–0–	–0–
12	38	7,371.24	5,017.42	21	2,353.82
13	11	4,096.65	3,033.36	7	1,063.29
14	1	569.75	298.41	1	271.34
15	37	5,805.49	4,676.70	16	1,128.79
16	63	24,059.69	19,747.71	24	4,311.98
17	63	12,299.09	9,221.49	34	3,077.60
18	46	15,990.39	13,205.09	18	2,785.30
19	8	1,697.80	977.55	5	720.25
20	–0–	–0–	–0–	–0–	–0–
21	52	30,232.76	21,270.04	34	8,962.72
22	90	47,975.66	35,586.35	52	12,389.31
23	13	4,971.92	2,655.77	13	2,316.15
24	84	23,918.58	15,869.11	48	8,049.47
25	1	801.90	477.18	1	324.72
26	44	9,506.30	7,652.49	24	1,853.81
27	24	3,352.85	2,836.77	10	516.08
28	63	22,744.79	19,036.73	28	3,708.06
29	2	1,520.00	1,407.38	1	112.62
30	7	1,477.84	1,188.74	3	289.10
31	365	96,834.54	71,311.51	198	25,523.03
32	101	23,902.08	16,900.78	61	7,001.30
33	127	23,140.87	17,824.77	63	5,316.10
34	153	19,510.19	14,758.61	57	4,751.58
35	163	24,886.38	18,619.41	92	6,266.97
36	81	13,429.05	10,217.18	43	3,211.87
37	51	14,700.44	9,878.44	23	4,822.00
38	86	16,870.45	12,937.45	45	3,933.00
39	32	6,106.91	5,245.81	11	861.10
40	12	2,161.55	1,296.75	9	864.80
41	23	5,334.99	4,714.15	14	620.84
42	64	11,195.88	6,976.56	54	4,219.32
43	36	6,253.25	5,363.45	11	889.80
	2,216	$553,774.43	$411,754.00	1,187	$142,020.43

APPOINTED COUNSEL PROGRAM
July 1, 1975 through May 31, 1976

Cir. No.	No. Cases Received	Total Amount	Total Paid	No. Out-Standing Obligations	Amount
01	10	$ 2,785.72	$ 1,215.77	6	$ 1,569.95
02	38	8,898.35	3,380.61	27	5,517.74
03	14	4,199.42	2,279.42	10	1,920.00
04	28	11,946.30	7,547.05	12	4,399.25
05	5	2,204.06	147.81	4	2,056.25
06	91	20,838.48	9,736.34	47	11,102.14
07	1	966.30	51.30	1	915.00
08	8	1,099.17	315.67	5	783.50
09	19	3,385.38	549.93	16	2,835.45
10	41	8,877.46	5,370.79	19	3,506.67
11	–0–	–0–	–0–	–0–	–0–
12	35	5,897.10	2,544.60	18	3,352.50
13	10	3,994.15	1,948.65	6	2,045.50
14	1	569.75	21.60	1	548.15
15	36	5,641.74	3,525.24	15	2,116.50
16	59	22,694.07	15,311.17	20	7,382.90
17	58	10,963.23	5,605.50	30	5,357.73
18	45	15,834.89	10,363.64	17	5,471.25
19	8	1,697.80	242.80	5	1,455.00
20	–0–	–0–	–0–	–0–	–0–
21	50	29,924.51	12,126.56	32	17,797.95
22	85	45,869.42	22,498.57	47	23,370.85
23	9	2,868.17	292.92	9	2,575.25
24	84	23,918.58	7,657.38	48	16,261.20
25	1	801.90	145.90	1	656.00
26	44	9,506.30	5,761.42	24	3,744.88
27	23	3,319.10	2,295.35	9	1,023.75
28	57	20,641.49	15,095.73	22	5,545.76
29	2	1,520.00	1,292.50	1	227.50
30	5	973.04	875.54	1	97.50
31	355	94,273.76	44,893.60	189	49,380.16
32	99	23,669.32	9,723.72	59	13,945.60
33	118	19,379.56	12,173.56	54	7,206.00
34	153	19,510.19	9,911.44	57	9,598.75
35	159	24,429.38	12,226.38	88	12,203.00
36	65	8,773.42	6,580.42	27	2,193.00
37	48	13,234.68	4,811.43	20	8,423.25
38	83	16,590.45	8,925.30	42	7,665.15
39	32	6,106.91	4,367.41	11	1,739.50
40	12	2,161.55	414.55	9	1,747.00
41	20	4,983.66	4,068.36	11	915.30
42	58	10,122.57	2,608.57	48	7,514.00
43	34	5,720.70	4,437.20	9	1,283.50
	2,103	$520,792.03	$263,341.70	1,077	$257,450.33

OFFICE OF STATE COURTS ADMINISTRATOR
SUPREME COURT BUILDING,
JEFFERSON CITY, MISSOURI 65101

MEMORANDUM

MARCH 22, 1974

To: All Magistrate Judges
From: James M. Parkison
Subject: Public Defender and Appointed Counsel for Indigent Accused of Misdemeanor

In January my office contacted the Magistrate Judges requesting information on misdemeanors and the impact indigency would have on the Public Defender system. The response was immediate. We were able to provide the legislative committee on State Fiscal Affairs with an estimated number of possible appointments in misdemeanor actions and thereby determine an estimated cost of House Bill 1360 which expands the public defender system.

We have analyzed the data submitted and have prepared the attached synopsis. We are sending it to you for your information.

Specific questions or comments submitted with your report will be answered individually.

If we can be of any assistance to you at any time please feel free to contact this office.

JMP : jat

Attachment

SYNOPSIS OF MISDEMEANOR QUESTIONNAIRE FROM MAGISTRATE JUDGES

The statistics derived from the information supplied on the questionnaire sent to magistrate judges relative to appointed counsel for indigents accused of misdemeanors indicate the following:

Counties *	With Defender Offices	With Appointed Counsel	Total
Responding	24	65	89
Not Responding	5	20	25
	29	85	114
Judges			
Responding	39	68	107
Not Responding	12	20	32
	51	88	139
Estimated Misdemeanors	39,768	76,085	115,853
Estimated Indigents	2,762	5,273	8,035
Estimated Appointments	1,872	1,175	3,047
Population of counties from which reports were received	2,478,651	870,136	3,348,787
Total Population	2,597,413	1,449,180	4,046,593

* St. Louis City is excluded from calculation.

Based upon the information submitted it was determined that a common factor should be calculated to allow an estimate of the number of cases that could have counsel appointed due to unavailability of a public defender.

The number of appointments per 1000 population was calculated to be 1.34 and multiplying the population of 1,449,80 indicated that 1,941 appointments could be anticipated.

At an average cost per case of $50 the estimated expenditure for one year would be $97,050.

APPOINTED COUNSEL

Appointed Counsel – Felony Cases

In FY75 there were 2,028 appointed counsel payments made and another 133 were not paid because of a lack of funds. There has been an average annual increase in new felony filings in the circuit courts of 11.3% per year over the last two years. If we estimate a similar rate of increase in appointed counsel cases then we can expect approximately 2,711 cases in FY77.

With no change in costs per case, then we can estimate the need for $623,530 for this segment of the program (2,711 cases with an average cost of 230 per case).

Appointed Counsel – Misdemeanors

Currently, caseload statistics are not reported by the magistrate courts, therefore the number of misdemeanors is available only through survey or sample techniques. The proposed legislation would provide representation for only a limited subset of the misdemeanant cases. It would effect only those indigents accused of a misdemeanor for which there is a reasonable likelihood of a jail sentence if the accused is found guilty.

Early in 1974 a poll was sent to all magistrate judges and they were asked to estimate the numbers of misdemeanors and the number of cases which might require representation by public defenders and appointed counsel. The estimate then was that 1,941 cases would require the appointment of counsel in the counties not served by public defenders.

Because of increases in the crime rate and the downturn in the economy, it would seem prudent to estimate perhaps a 25% increase over the 74 estimate for 1977, or 2,426 cases.

There is little data upon which to base an estimate of the cost of these cases; however, most knowledgeable estimates run between $50 and $100 per case. An estimate of $75 per case would appear to be reasonable.

At $75 per case for 2,426 cases, the cost of appointed counsel for misdemeanors would appear to be about $181,950.

Appointed Counsel – Juvenile

The reported data for juvenile cases in the circuit courts includes all formal juvenile proceedings including adoption, neglect cases, etc. The number of cases which might involve the possibility of a restraint of liberty are not known.

For purposes of estimating the volume of cases which might require the appointment of counsel, 20% of the juvenile cases reported in circuits not having defenders appears to be a reasonable estimate.

Of the 16,372 juvenile cases reported disposed of in FY75, 4,094 were reported by circuits not having public defenders. Using the 20% estimate, then 819 cases can be expected to need representation.

Estimates of the cost of appointed counsel representation for juveniles is complicated because of the nature of the proceedings and the variation in the circumstances surrounding these cases. If we estimate the average cost of representation for juvenile cases to be approximately $100, then the cost for 819 cases at $100 per case would be $81,900.

IN THE SUPREME COURT OF MISSOURI
EN BANC

JULY 1, 1976

ORDER

WHEREAS, on November 15, 1975 the Supreme Court ordered the Courts Administrator to withhold approval for payment of attorney fee bills except to approve payment of out-of-pocket expenses borne by the attorneys, and

WHEREAS, on June 30, 1976 only $144,935.64 of the original $411,754 is available for payment of attorney fee bills received prior to June 30, 1976 which total $286,956.07, and

WHEREAS, grants through the Missouri Council on Criminal Justice Region V have made monies available for payment of appointed counsel fees in the 21st and 22nd Circuits if all state funds for such payments are exhausted, and

WHEREAS, the appropriation for payment of court appointed counsel fees for the fiscal year July 1, 1976 to June 30, 1977 is $464,778 to the Supreme Court, and

WHEREAS, beginning August 13, 1976, jurisdiction of the program is expanded to cover juvenile and misdemeanor cases, and

WHEREAS, a Public Defender Commission is to be created with administrative and budgetary powers,

IT IS ORDERED that the Courts Administrator be and he is hereby instructed as follows: To approve for payment on a *pro rata* basis all properly authorized attorney fee bills received prior to the close of the 1975–1976 fiscal year and after making said payments, to notify the circuit judges of steps to be taken to recertify the unpaid balance on said bills for payment from subsequent appropriations; to approve for payment all bills remaining outstanding as of June 30,

1976 in the 21st and 22nd Circuits from available grant funds; to continue not to approve for payment from the 1976–77 appropriation for court appointed counsel any attorney fee bills received by the Court Administrator's Office on or after July 1, 1976, except to approve for payment out-of-pocket expenses borne by attorneys while representing indigent defendants as court appointed counsel; and to prepare a report to the Public Defender Commission on the status of the program's finances as of August 13, 1976.

This Order shall remain in effect until the end of Fiscal Year 1976–1977, at which time the balance of said appropriation shall be distributed *pro rata* to all attorneys having bills for representation as court appointed counsel accrued during the balance of Fiscal Year 1976–1977 or until such time as the Public Defender Commission shall make an alternative recommendation and the Supreme Court has approved same.

Day - to - Day

Robert E. Seiler, Chief Justice

Supreme Court, U. S.
FILED
FEB 22 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-729

STATE OF MISSOURI, ex rel. O. J. GIBSON, JR.,
and CAPE GIRARDEAU COUNTY
BAR ASSOCIATION,
Relators-Petitioners,

vs.

The Honorable STANLEY A. GRIMM, Judge, Circuit
Court of Cape Girardeau County, Missouri,
Respondent.

Consolidated with

State of Missouri, Appellant,

vs.

Michael Wayne Probst, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

BRIEF FOR RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-729

STATE OF MISSOURI, ex rel. O. J. GIBSON, JR., and CAPE GIRARDEAU COUNTY BAR ASSOCIATION,
Relators-Petitioners,

vs.

The Honorable STANLEY A. GRIMM, Judge, Circuit Court of Cape Girardeau County, Missouri,
Respondent.

Consolidated with

State of Missouri, Appellant,

vs.

Michael Wayne Probst, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Missouri, en banc, reversing the Order taxing costs and discharging the preliminary rule in prohibition is reported as follows: *State ex rel. Gibson* v. *Grimm*, consolidated with *State* v. *Probst*, 540 S.W.2d 17 (Mo. Banc 1976).

JURISDICTION

This Court has jurisdiction pursuant to Title 28 U.S.C., §1257(3), which provides that this Court may review the final judgment of the highest court of the state by writ of certiorari where title, right, privilege, or immunity is specially set up or claimed under the Constitution of the United States.

QUESTION PRESENTED

1. Whether the holding of the Supreme Court of Missouri that the attorneys of Missouri were required to accept uncompensated appointments to represent indigent criminal defendants prior to August 13, 1976, in misdemeanor cases where a sentence of imprisonment may have been imposed, operates to deny the petitioner, O. J. Gibson, Jr., his constitutional rights to due process of law, the equal protection of the law and freedom from involuntary servitude?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Twelfth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

The two cases involved in this petition for writ of certiorari arise out of the appointment of Ora James Gibson, Jr., to represent Michael Wayne Probst.

On March 26, 1975, Michael Wayne Probst was charged with a violation of §560.395, RSMo 1969, a misdemeanor

punishable by fine, imprisonment, or both fine and imprisonment. On April 10, 1975, the petitioner, O. J. Gibson, Jr., a member of the Cape Girardeau County Bar Association, was appointed by the Honorable Jerry S. Estes, Judge of the Magistrate Court of Cape Girardeau County, Missouri, to defend Probst, an indigent. On June 6, 1975, Probst was found guilty as charged and sentenced to six months in the County Jail. Mr. Gibson, on behalf of Probst, prosecuted an appeal to the Circuit Court of Cape Girardeau County, Missouri. On August 12, 1975, a jury found Probst guilty of the charges contained in the complaint and sentenced him to six months' imprisonment in the County Jail. Mr. Gibson then filed, on behalf of Probst, a motion for new trial, which was argued on September 15, 1975, and thereafter denied.

Subsequently, Michael Wayne Probst advised the Circuit Court of Cape Girardeau County, Missouri, that he desired to perfect an appeal from the judgment of that court in overruling his motion for new trial. On December 3, 1975, the Honorable Stanley A. Grimm, Judge of the Circuit Court of Cape Girardeau County, Missouri, respondent herein, notified Mr. Gibson that he intended to reappoint him as attorney for Probst for the purpose of prosecuting the appeal.

By letter of December 5, 1975, Mr. Gibson informed the respondent of his unwillingness to proceed further with the defense of Michael Wayne Probst. Thereafter, on December 9, 1975, the respondent advised Mr. Gibson of the court's intention to hold him in contempt if he refused reappointment to prosecute the appeal.

On December 12, 1975, the Cape Girardeau Bar Association advised the Honorable Jerry S. Estes, Judge of the Magistrate Court of Cape Girardeau County, Missouri, and the respondent that ". . . hereafter members

of the Cape Girardeau County Bar Association will not feel *compelled* to accept appointments to represent indigent defendants accused of crimes punishable by imprisonment . . ., without payment of just compensation therefor . . ."

On December 15, 1975, the respondent entered his Order stating the court's intention to appoint Mr. Gibson to prosecute the appeal of Michael Wayne Probst and, in the event of a refusal on the part of Mr. Gibson, to hold him in contempt of court.

On December 30, 1975, the petitioners filed their petition for writ of prohibition and suggestions in support thereof with the Missouri Court of Appeals, St. Louis District. On that same date, the Missouri Court of Appeals, St. Louis District, entered its Order granting the preliminary writ of prohibition. The writ was made returnable on January 7, 1976.

On December 2, 1975, Mr. O. J. Gibson, Jr., filed a motion for allowance of attorney's fees and expenses in the Circuit Court of Cape Girardeau County. On the same date, the Cape Girardeau County Bar Association moved for leave to file a memorandum in support of Mr. Gibson's motion for allowance of attorney's fees and expenses. After the motion was granted, the Cape Girardeau Bar Association filed its memorandum on December 3, 1975.

On December 3, 1975, the Circuit Court of Cape Girardeau County, Missouri, entered its Order allowing attorney's fees and out-of-pocket expenses, taxing the costs to the State of Missouri and the County Court of Cape Girardeau County, Missouri.

On December 4, 1975, Mr. A. J. Seier, Jr., Prosecuting Attorney of Cape Girardeau County, Missouri, filed his motion to retax costs. Said motion alleged that no statu-

tory authority existed for the payment of fees to attorneys appointed by the court to defend indigent defendants in misdemeanor cases. On December 15, 1975, the Circuit Court sustained the motion as to the County of Cape Girardeau, Missouri, and overruled the motion as to the State of Missouri.

On December 23, 1975, the Prosecuting Attorney of Cape Girardeau County, Missouri, filed notice of appeal to the Missouri Court of Appeals, St. Louis District, on behalf of the State of Missouri.

Although portions of the statistical data included in the petitioners' appendix were included in the petitioners' brief filed in the consolidated case in the Missouri Court of Appeals, St. Louis District, the respondent notes that the data has never been received into evidence at an adversary proceeding and the State of Missouri has never enjoyed the opportunity to litigate the statistical validity of the data or to require the petitioners to establish the truth of the factual assertions.

ARGUMENT

The decision of the Supreme Court of Missouri holding that the attorneys of Missouri were required to accept uncompensated appointments to represent indigent criminal defendants prior to August 13, 1976, in misdemeanor cases where a sentence of imprisonment may have been imposed does not operate to deny the petitioners due process of law, the equal protection of the law, or freedom from involuntary servitude.

In *State ex rel. Gibson* v. *Grimm*, 540 S.W.2d 17, 18 (Mo. Banc 1976), the Supreme Court of Missouri held that the attorneys of Missouri were required to accept

uncompensated appointments to represent indigent criminal defendants prior to August 13, 1976, in misdemeanor cases where a sentence of imprisonment may have been imposed. In reaching this decision, the Supreme Court of Missouri recognized that money may not be withdrawn from the state treasury absent an appropriation law, and noted that the burden previously placed on the attorneys of Missouri ended, for practical purposes, with the enactment of S.C.S. H.B.S. House Bill No. 1095, 2nd Regular Session, 78th General Assembly, effective August 13, 1976 (*Id.* at 18). The Revised Statutes of Missouri now provide for the appointment of the circuit public defender or compensated counsel in misdemeanor cases which will probably result in confinement in the county jail upon conviction (§§600.010-600.166, V.A.M.S., 1977 Cumulative Annual Pocket Part).

Additionally, §600.010(1), V.A.M.S., 1977 Cumulative Annual Pocket Part, provides for the appointment of a public defender in the 32nd Judicial Circuit, which includes Cape Girardeau County, Missouri. Under House Bill No. 16, currently pending before the 79th General Assembly, the Public Defender Commission will receive $661,033.00 as an emergency appropriation for the period ending June 30, 1977. Under House Bill No. 4, currently pending in the 79th General Assembly, the Public Defender System will receive $2,593,092.00 for the period beginning July 1, 1977, and ending June 30, 1978. Under these circumstances, the decision of the Supreme Court of Missouri certainly does not operate to deprive the petitioners of due process of law, the equal protection of the law, or freedom from involuntary servitude, since the condition of which the petitioners complain has been remedied by the State of Missouri.

Further, as officers of the court, attorneys are bound to render service when appointed by the court. *Powell* v. *Alabama*, 287 U.S. 45, 73 (1932). A license to practice law confers upon an attorney certain rights and privileges and with them imposes duties and obligations to be reciprocally enjoyed and performed. *State ex rel. Gentry* v. *Becker*, 174 S.W.2d 181, 184 (Mo. 1943); *Jackson* v. *State*, 413 P.2d 488, 489-490 (Alas. 1966); *Brown* v. *Board of County Commissioners of Washoe County*, 451 P.2d 708, 709 (Nev. 1969); *Dade County* v. *McCrary*, 260 So.2d 543, 545-546 (Fla. Dist. Ct. App., 3rd Dist. 1972); *United States* v. *Dillon*, 346 F.2d 633, 635-637 (9th Cir. 1965), cert. denied 382 U.S. 978; *Tyler* v. *Lark*, 472 F.2d 1077, 1079 (8th Cir. 1973), cert. denied 414 U.S. 840; *Wright* v. *Louisiana*, 362 F.2d 95 (5th Cir. 1966); and *Dolan* v. *United States*, 351 F.2d 671, 672 (5th Cir. 1965). Therefore, the general rule recognized in the overwhelming majority of state and federal jurisdictions remains that an attorney must render service without compensation when appointed to represent an indigent defendant unless a specific statute provides compensation. *DeRodulfa* v. *United States*, 461 F.2d 1240, 1256 (D.C.Ct.App. 1972); *Botts* v. *United States*, 413 F.2d 41, 44 (9th Cir. 1969); *Board of Supervisors of George County* v. *Bailey*, 236 So.2d 420, 422-423 (Miss. 1970); *State ex rel. Gentry* v. *Becker, supra*; *Jackson* v. *State, supra*; *Brown* v. *Board of County Commissioners of Washoe County, supra*; *Dade County* v. *McCrary, supra*; *United States* v. *Dillon, supra*; *Tyler* v. *Lark, supra*; *Wright* v. *Louisiana, supra*; and *Dolan* v. *United States, supra*. See also *Annot.* 21 A.L.R.3d 819 (1968).

The requirement that an attorney render gratuitous service to a court does not, per se, deny due process of law. *United States* v. *Dillon, supra; Tyler* v. *Lark, supra*; *State ex rel. Partain* v. *Oakley*, 227 S.E.2d 314, 318-319 (W.Va. 1976); *People* v. *Hutchinson* v. *Shuster*,

195 N.W.2d 787, 788 (Mich.Ct.App., Div. 3 1972); and *State* v. *Rush*, 46 N.J. 399, 217 A.2d 441, 448-449 (N.J. 1966). In fact, no right to compensation for performing legal services for private litigants is derived from the Constitution. See, *deRodulfa* v. *United States, supra*, and cases cited therein at 461 F.2d 1256. In *State* v. *Corey*, 117 N.J.Sup. 296, 284 A.2d 395, 398-399 (Passaic County Court 1971), aff'd 293 A.2d 196, 197 (Superior Court of New Jersey 1972), cert. denied 409 U.S. 1125, the constitutional arguments raised herein were rejected by the court in upholding a contempt order against an attorney for refusing to represent an indigent charged with a misdemeanor.

The respondent acknowledges that recent authority in certain other jurisdictions recognizes that the overwhelming burden of rendering gratuitous representation to indigents cannot be imposed upon attorneys alone without denying the constitutional rights of the attorneys. See *State* v. *Rush, supra*; *State ex rel. Partain* v. *Oakley, supra*; and *Bradshaw* v. *Ball*, 487 S.W.2d 294 (Ky. 1972). Nonetheless, the fact that the Missouri legislature had already remedied the situation rendered these cases inapplicable to the determination of the issues raised in the Supreme Court of Missouri. For example, in *Bradshaw* v. *Ball*, 487 S.W.2d 294, 297, 298-300 (Ky. 1972), relied upon by the petitioner, the Court of Appeals of Kentucky held that the individual attorneys were not entitled to compensation, because prior to enactment of the Kentucky Public Defender Act, the attorneys had no right to compensation. Similarly, petitioner Gibson enjoys no right to compensation for representing indigent defendants in misdemeanor cases prior to August 13, 1976.

Because of the enactment of legislation by the State of Missouri and the decision by the Supreme Court of Missouri, the only issue raised by the petitioners concerns whether or not petitioner Gibson is entitled to compensa-

tion for representing indigent defendants in misdemeanor cases prior to August 13, 1976. In *United States* v. *Dillon*, 346 F.2d 633, 636 (9th Cir. 1965), cert. denied 382 U.S. 978, this Court denied a petition for writ of certiorari based upon the allegation that attorney Manley B. Strayer was entitled to compensation for representing an indigent defendant even though statutory provision for such compensation had not been enacted at the date of his appointment. As the court-appointed attorney in *United States* v. *Dillon, supra*, was not constitutionally entitled to compensation for services performed pursuant to an appointment made prior to enactment of the Criminal Justice Act of 1964 (18 U.S.C. §3006A), petitioner Gibson enjoys no constitutional right to compensation for representing indigents in misdemeanor cases prior to August 13, 1976.

Under Rule 19 of the United States Supreme Court Rules, review by writ of certiorari is not a matter of right and will be granted only where special and important reasons exist for review. The respondent submits that this case neither presents a decision by a state court concerning a substantial federal question nor a decision by a state court improperly applying the appropriate federal decisions. Rather, the respondent submits that this case involves an application of the appropriate federal decisions by the Supreme Court of Missouri. The respondent submits that the enactment of S.C.S. H.C.S. House Bill No. 1095 relieved any burden placed upon the petitioners, and that the decision of the Supreme Court of Missouri requiring attorneys to bear the burden of providing for the defense of indigents charged with misdemeanors prior to August 13, 1976, does not operate to deny the petitioners due process of law, the equal protection of the law, or freedom from involuntary servitude. Therefore, the circumstances of this case provide this Court with no compelling reason for exercising its discretionary jurisdiction.

CONCLUSION

WHEREFORE, the respondent respectfully submits that this petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief were served by mailing, postage prepaid, this 21st day of February, 1977, to:

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